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In the Supreme Court of the United States

OCTOBER TERM, 1974

JOSEPH NOCAR and JOHN PENDERGAST,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JOSEPH NOCAR and JOHN PENDERGAST,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Joseph Nocar and John Pendergast, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 31, 1974, affirming petitioners' conviction and the petition of the petitioners for rehearing and suggestion for rehearing en banc before the United States Court of Appeals for the Seventh Circuit denied on July 18, 1974.

OPINION BELOW

The opinion of the Court of Appeals, appears in the Appendix hereto, p. 1.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1974 and a timely petition for rehearing and suggestion for rehearing en banc filed on June 14, 1974 was denied on July 18, 1974. The jurisdiction of this court is envoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the failure of the Attorney General to update and republish schedules of controlled substances as required by 21 U.S.C. 812 (a) prohibits the petitioners' federal prosecution under 21 U.S.C. 841 (a) (1) for the unauthorized use of marijuana since there was no valid prohibition in force at the time of the alleged occurrence on January 8, 1972.

2. Whether probable cause existed for the warrantless search of a motor vehicle by government agents in this cause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. 963
21 U.S.C. 952 (a)
21 U.S.C. 812
21 U.S.C. 812 (a)
21 U.S.C. 841 (a)
36 Fed.Reg. 7776, at 7802
37 Fed.Reg. 9545
21 U.S.C. 811
44 U.S.C. 1501-1511
44 U.S.C. 1507
44 U.S.C. 1503
18 U.S.C. 2516 (1)
Fourth Amendment to United States Constitution
28 C.F.R. 0:100, 1972

STATEMENT OF THE CASE

Petitioners were indicted in the United States District Court for the Northern District of Illinois, Eastern Division, in a one count indictment and charged with knowingly and intentionally possessing a quantity of marijuana with intent to distribute same on or about January 8, 1972, in violation of Title 21, U.S.C. 841 (a) (1) (Comprehensive Drug Abuse Prevention and Control Act).

The Comprehensive Drug Abuse Prevention and Control Act of 1970 was enacted in October, 1970. Under the 1970 Act, the Attorney General was directed regularly to update and republish lists designating which drugs were subject to control, including control by criminal sanction. He has since subdelegated all of his duties under the Act to the Director of the Bureau of Narcotics and Dangerous Drugs. 28 C.F.R. 0:100, 1972. Included in the subdelegation was the basic legislative responsibility to proscribe what substances shall be controlled. The statute became effective on October 27, 1970. (See Historical Note in 21 U.S.C.A. 812 at p. 28). Under 21 U.S.C. 812, the schedules of controlled substances initially consisted of the lists published in the statute as originally promulgated. The statute establishes five schedules of controlled substances. 21 U.S.C. 812 (a). "Such schedules shall initially consist of the substances listed in this section". The statute goes on as follows:

> "The schedules established by this section shall be updated and republished on a semi-annual[1] basis during the two year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter."

---

[1] Semi-annual means twice a year or every six months. Webster's Seventh New Collegiate Dictionary 787 (1972).

The complete history of the pertinent republications pursuant to the statutory scheme is as follows:

There was a full republication on April 20, 1971, effective May 1, 1971 (36 Fed.Reg. 7776, at 7802) (six months before the date required by law) and again on May 12, 1972, nunc pro tunc April 27, 1972 (37 Fed.Reg. 9545).

However, there was no full republication, nor any republication at all, in October, 1971, as required by law. 21 U.S.C. 812 (a).

Petitioner then filed a motion to dismiss the indictment due to the failure of the Attorney General to update and republish schedules of controlled substances as required by 21 U.S.C. 812 (a) which motion was denied and allowed to stand as petitioners' post trial motion.

At the hearing on the defendants' Motion to Suppress, custom's agent Robert J. Smith testified that he had received a telephone call from a reliable informant, informing him that there were two men and a woman driving a blue Toyota automobile with Texas license JXP 530, in Chicago, attempting to locate buyers for narcotics and that they were staying in a Motel at Sheridan and Foster. The telephone call was received January 7, 1972, at 12:00 noon. Agent Smith then testified that he proceeded to the motel at that location and verified that there was a vehicle of that description and license number at the motel. Surveillance was then established of the car and the room that the individuals were registered in with that automobile. Agent Smith then testified that two men and a woman (one of the men being defendant, Nocar) were in Room 232 at the Motel and the drapes on the room were drawn wide open and it was very easy to see the people in the room. Agent Smith then checked the registration of the blue Toyota motor

vehicle and was told that the license plates were registered to one, M. A. Guerra, in Rio Gandy City. Agent Smith then stated that the agent obtaining the information concerning the license plates also checked files and found that Carol Guerra, daughter of M. A. Guerra, was under indictment and that an agent in Falcon Heights, Texas had stated that the automobile had been in Mexico and had crossed back into the United States on December 26th. Agent Smith then testified that a Thunderbird automobile driven by John Pendergast came to the Motel and Pendergast had a conversation with the other persons in the motel room and that surveillance was maintained while they were having this conversation.

Agent Smith then stated that he maintained surveillance on January 7, 1972, and followed the four parties (two in each vehicle) as they went to the rear of 1203-5 N. State, Chicago, and backed the Toyota into a garage at that address. Agent Smith testified that the blue Toyota left the garage behind 1203-5 N. State Street, after a fairly short amount of time. Agent Smith then followed the Toyota back to the Travel Lodge Motel and an application for a search warrant was thereafter made to the United States District Court on January 7, 1972, for the garage behind 1203-5 N. State Street. The garage was searched at 6:00 oclock that evening and nothing contraband was found.

The following day, January 8, 1972, surveillance was being made by several government agents of the area near State and Division Streets (1200 North). Agents Smith and Thomas Allen King were in an automobile parked on the west side of State Street in the 1200 block, facing south, at approximately 1:50 P.M. Defendants, Pender-

gast and Nocar, were walking towards Division Street. Agent Smith then parked his vehicle to the south of the garage in the alley. (It was stated that the southern exit to the alley, which was Division Street, was a couple of hundred feet south of the garage.)

Agent Smith stopped his car at the southern end of the alley. Agent King left the car and walked north in the alley. Agent King then walked north in the alley past the vehicle to a point about 10 to 15 yards north of the garage in the alley. The Toyota vehicle was backed into the garage. Agent Smith was waiting in his vehicle at the south end of the alley until signalled by Agent King (after Agent King had walked past the garage and turned and faced south to signal Agent Smith).

At this time (approximately 1:50 P.M. on January 8, 1972) there were approximately seven or eight agents in the vicinity of the 1200 block of State Street, in communication by two way radio. This was a mile or a mile and a half from the Federal Building.

Agent King stated that he, while walking north in the alley, observed the Toyota automobile partially backed into the garage. The door of the garage was partially closed and flush to the trunk lid of the vehicle which was open. The trunk of the vehicle was in the rear. A rug was draped over the opening between the trunk lid and the body of the automobile, the right rear fender of the automobile. Agent King testified that he observed defendant Nocar, removing what appeared to be white bags from the trunk of the automobile and handing them to Mr. Pendergast. Agent King said he observed Mr. Pendergast take the bags from Mr. Nocar and move them to some area farther back in the garage where he could not

see them. All of his observations were made as he walked at a normal pace without slowing down past the opening of the garage. He did not slow down and the full time he could observe anything was 10 to 15 seconds as he walked by.

Agent King, after walking past the garage, then signalled Agent Smith. Agent Smith drove north in the alley and stopped his car and alighted therefrom a short distance south of the entrance to the garage. Agent King, approaching on foot from the north of the garage, and Agent Smith, approaching on foot from the south of the garage, came to the entrance of the garage almost simultaneously. The entrance to the garage was somewhere between eight feet wide and ten or twelve feet wide.

When the agents came to the door of the garage, the trunk of the car was closed.

It was never contended, by the Government that Agent King could ascertain, or see, the contents of the white sacks he claimed to have seen. Agent King further stated that he could not determine what was inside of the bags as he was walking past the garage and couldn't tell what type of bags they were.

Agent Smith admitted that he couldn't see inside of the trunk of the automobile at the time he exited from his automobile, and stated that the trunk was closed when he got to the opening of the garage and looked into the garage.

Agents Smith and King entered the garage simultaneously, and Agent King admittedly had his gun drawn.

Agent Smith ordered defendant, Nocar, to open the trunk of the Toyota vehicle. After the trunk of the vehicle had been opened, Agent Smith stated that he then placed the defendants under arrest.

No attempt was made to obtain a search warrant for the motor vehicle on January 8, 1972. Agent King testified that he knew that he could go and obtain a search warrant from a Magistrate (wherever the Magistrate might be) even though it was his understanding that the Magistrate's office closed at noon on Saturdays. (T. 1/29/73, P. 70).

The Lower Court, after hearing, denied the defendants' Motion to Suppress the Evidence obtained from the search of the Toyota motor vehicle.

The denial of the Motion to Suppress by the Lower Court was based upon the finding by the Lower Court that the agents had probable cause to believe that the Toyota automobile contained contraband drugs.

The petitioners waived a jury trial and stipulated that the testimony of the government witnesses which was adduced at the hearing on the motion to suppress would be identical to their testimony on trial and the court, on the basis of the stipulated testimony, entered a judgment of guilty against both petitioners. On June 22, 1973, the court denied the post trial motion to dismiss the indictment of the defendants and sentenced the petitioner Nocar for three years followed by a special three year parole term and the petitioner Pendergast for six months to be followed by a period of probation of four years.

Petitioners appealed from the judgment of conviction and sentence. The court of Appeals for the Seventh Circuit affirmed in an opinion dated May 31, 1974 and denied the petitioners' motion for rehearing and suggestion for rehearing en banc on July 18, 1974.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW UNDULY EXTENDS THE REACH OF 21 U.S.C. 812 (a) AND CONFLICTS WITH THE CONGRESSIONAL INTENT AND THE RULE THAT CRIMINAL STATUTES ARE TO BE STRICTLY CONSTRUED.

Defendants were convicted of knowingly and intentionally possessing with intent to distribute approximately 18,772 grams of marijuana, a Schedule I narcotic drug controlled substance, in violation of Title 21, U.S.C., Section 841 (a) (1). The gist of the offense is that the substance which they allegedly knowingly and intentionally possessed with intent to distribute was a controlled substance.

Due to the failure of the Attorney General to comply with the statutory requirements concerning republication of lists of controlled substances, marijuana cannot properly be characterized as a controlled substance at the time of the alleged offense in the indictment, to-wit: January 8, 1972. (A. 1) Therefore, no offense was or could have been committed as alleged, and the convictions should be reversed.

Under 21 U.S.C. 812, the schedules of controlled substances initially consisted of the lists published in the statute as originally promulgated. The statute became effective on October 27, 1970. (See Historical Note in 21 U.S.C.A. 812, at p. 28). The statute establishes five schedules of controlled substances. 21 U.S.C. 812(a). "Such schedules shall *initially* consist of the substances listed in

this section". (Ibid., emphasis added.) The statute goes on as follows:

> "The schedules established by this section *shall be updated and republished* on a semi-annual[2] basis during the two year period beginning one year after the date of enactment of this subchapter and *shall be updated and republished* on an annual basis thereafter." (Emphasis added)[3]

Thus, under the terms of the statute, the schedules created therein as listed were only valid for one year from its effective date; that is, for one year from October 27, 1970; that is, until October 27, 1971.

The complete history of the pertinent republications pursuant to the statutory scheme is as follows:

There was a full republication on April 20, 1971, effective May 1, 1971 (36 Fed. Reg. 7776, at 7802) (six months before the date required by law) and again on May 12, 1972, nunc pro tunc April 27, 1972 (37 Fed. Reg. 9545).

However, there was no full republication, *nor any republication at all,* in October 1971, as required by law. 21 U.S.C. 812 (a).

Therefore, from October 1971 (when a full republication should have taken place, but did not) and May of 1972 (when full republication was made) marijuana was not a controlled substance, because there were no valid schedules

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[2] Semi-annual means twice a year or every six months. Webster's Seventh New Collegiate Dictionary 787 (1972).

[3] The subsequent schedules are to be promulgated by the Attorney General, see 21 U.S.C. 811, who obviously also is responsible for the required republications.

due to lack of republication as required during that interim. Thus, any criminal charge alleging a marijuana offense between those dates must fall.

In the case at bar, the time of the alleged offense, (January 8, 1972), falls within that interim period during which there were no valid schedules of controlled substances.

The mandate of publication is not a mere technical requirement. Those subject to prosecution for violation of law are constitutionally entitled to know what conduct the law forbids. Indeed, this is a clear requirement of due process of law. *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453, 83 L.Ed. 888, 890 (1939); *Bouie* v. *City of Columbia,* 378 U.S. 347, 350-51, 12 L.Ed. 2d 894, 898 (1939).

Where, as here, republication of revised schedules is required by the terms of the statute itself, such republication is to be accomplished by printing in the Federal Register. See Federal Register Act 44 U.S.C. 1501 through 1511. Specifically, Sec. 1505 (a), provides in pertinent part:

> "There shall be published in the Federal Register—
> . . .
> (3) documents or classes of documents that may be required to be published by Act of Congress."

21 U.S.C. 812 (a) undisputedly is an Act of Congress requiring publication of documents, to-wit, schedules of controlled substances.

Moreover, 44 U.S.C. 1507 provides that no document required to be published in the Federal Register shall be valid as against any person not having actual knowledge thereof until copies have been filed with the Office of the Federal Register and made available for public inspection pursuant to 44 U.S.C. 1503. The logical import of this

is that failure to publish a document required to be published renders it invalid; for without publication of a document required to be published, there is no notice, either actual or constructive.

This principle has been judicially recognized. In *Borak* v. *Biddle,* 141 F.2d 278 (D.C. Cir. 1944), the court held that a purported Civil Service Commission regulation which had never been published in the Federal Register as required by law could not be held effective as against a person with no actual knowledge thereof. Id. at 280. And in *Hotch* v. *United States,* 212 F.2d 280 (9 Cir. 1954), the court reversed the conviction of defendant, a commercial fisherman, for having fished in certain waters, because a regulation purporting to extend the time of the prohibition was not published in the Federal Register, *as required by law.*[4]

The *Hotch* case is persuasive authority in support of defendants' position, inasmuch as there, as here, defendant's conviction depended on the validity of a purported extension of an existing regulatory scheme; and there, as here, failure to publish such extension rendered it invalid. Hence, in the case at bar, once the schedules lapsed by the terms of the statute which created them because of failure of the Attorney General to cause updated schedules to be published at the times required by law, there were no valid schedules during that interim period as set forth above.

Thus, by the terms of the Federal Register Act, and of the Drug Abuse Prevention and Control Act, by pertinent case law, and by the requirements of due process of law, defendants' convictions were based on non-existent provisions and should be reversed.

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[4] This holding was reached regardless of whether defendant had actual notice of the extension. 212 F.2d at 284.

There is a further reason related to the republication requirement which invalidates the convictions. Publication is to be by the Attorney General. See 21 U.S.C. 811. However, one John E. Ingersoll, Director of the Bureau of Narcotics Drugs, caused the inapplicable republication of May 8, 1972, 37 Fed.Reg. 9545 (and the previous republication as well). Thus, even if the republication were timely, as it was not, it would have been invalid, since it was caused to be made by one not authorized so to do.

Where a statute authorizes or requires a particular individual to perform an act, only that individual has power to perform it.

See, e.g., the numerous wiretap cases held invalid because the authorization of the Attorney General under 18 U.S.C. 2516 (1) was improperly delegated in a manner not authorized by the Congress. *United States* v. *Robinson*, 468 F.2d 189 (5 Cir. 1972); *United States* v. *Giordano*, 469 F.2d 522 (4 Cir. 1972).

In *United States* v. *Giordano*, 15 CRL 3033, decided May 13, 1974, the Supreme Court held:

> "We conclude that Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specifically designated by him and the primary or derivative evidence secured by wire interception pursuant to a court order issued in response to an application which was, in fact, not authorized by one of the statutorial designated officials must be suppressed. . . ."

The United States Court of Appeals for the Seventh Circuit has decided an important question of federal law, which to the knowledge of the petitioner has not been, but should be settled by this Court because of its effect on the

validity of 21 U.S.C. 812 (a) during the period of time from October 28, 1971 to May 11, 1972, since during that period there was no valid prohibition in force due to the failure of the Attorney General and the Bureau of Narcotics and Dangerous Drugs to update and republish the schedules of controlled substances as required by law.

II.

THE DECISION OF THE LOWER COURTS UNDULY EXTENDS THE THEORY OF EXISTENCE OF PROBABLE CAUSE AND REASONABLE SEARCH AND SEIZURE.

It was the contention of the Defendants that the search and seizure in this cause was in violation of the Defendants' Fourth Amendment rights. The search was conducted without color of warrant, without the voluntary consent of the Defendants and without the existence of any exigent circumstances so as to justify a warrantless search of the motor vehicle in this cause.

The lower courts found that there was probable cause to conduct a warrantless search of the motor vehicle in this cause where the search was initially based on an unknown informant's assertion that certain named persons (neither of the Defendants) were attempting to sell narcotics. This information was characterized as being superior to casual rumor but the Defendants' contention was that the informant's assertion and the subsequent observations of the agents (which the court found to be corroborative) was still not sufficient to constitute probable cause for the search of the automobile.

The lower courts found that the observations of Agent King and the slamming of the trunk lid were the least needed corroboration of the informer's tip to create prob-

able cause. The courts found that the agents in this cause had many more facts on which to rely than had the agents in *Henry* v. *United States,* 361 U.S. 98 (1969). Their ruling was that in this cause, the agents' observations of white bags which are often used to transport marijuana, and the apparent covert garage activities of the Defendants were deemed to be sufficient corroboration of an informant's tip that someone was attempting to sell narcotics. The Defendants argue that these facts are identical to the facts in *Henry* v. *United States,* where Defendants were observed in apparently covert activities in an alley with large boxes (which could have been used to transport goods stolen in Interstate shipment) and the court found that these activities were not sufficient to corroborate an informant's tip that the parties had participated in an Interstate theft of merchandise.

The lower courts repeatedly stated that it was practicable for the agents to try to obtain a search warrant before conducting the search, and stated that the magistrate is present on Saturdays at the Federal building only until noon. The lower courts completely overlook and ignore the fact that the agents made no attempt to ascertain whether a magistrate was possibly present in the Federal building and made no attempt to ascertain how long the warrant procedures would have taken. The Government's contention that Carol Guerra, or the unidentified male could have possibly attempted to remove the Toyota automobile is not a situation which was similar to *United States* v. *Menke,* 468 F.2d 20, which had been relied on by the Government. In the *Menke* case, the parties who might have access to the automobile were in no way connected to the contraband which the Government agents believed to be in

the automobile. Also, in the instant case, the number of agents present at the scene and the short distance to the Federal Building to obtain a warrant would have certainly allowed the federal agents to present a petition for warrant without jeopardizing loss of contraband.

The failure of the Government agents to seek a warrant so that the conclusion as to probable cause for a search would have been that of an experienced federal magistrate or judge certainly was violative of the Defendants' Fourth Amendment rights. Since the agents failed to submit the factual situation to an independent magistrate, the factual situation and the apparent discrepancies therein between the Government's version and the Defendants' version of the facts surrounding the arrest should have been more closely scrutinized by the court. It is the contention of the Defendants that a thorough review of all of the facts and law in the case at bar should have led the lower courts to the inescapable conclusion that the motions of the Defendants, Nocar and Pendergast, to suppress the evidence in this cause should have been granted.

CONCLUSION

For the reasons urged herein, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT J. EGAN
THOMAS H. RAMSEY and
BARRY HOLT

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1973 — SEPTEMBER SESSION, 1973

Nos. 73-1703, 73-1704

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH NOCAR and JOHN PENDERGAST,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 72 CR 667
RICHARD W. MCLAREN, *Judge.*

ARGUED NOVEMBER 27, 1973 — DECIDED MAY 31, 1974

Before CLARK, *Associate Justice,** PELL, *Circuit Judge,* and NOLAND, *District Judge.***

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, is sitting by designation.

** Judge James E. Noland of the Southern District of Indiana is sitting by designation.

PELL, *Circuit Judge.* On the basis of the parties' stipulated testimony, the trial judge found Joseph Nocar and John Pendergast guilty of knowingly and intentionally possessing a quantity of marijuana (18,772 grams) with intent to distribute the same, 21 U.S.C. § 841(a)(1).[1] Defendants raise three issues on this appeal: (1) whether the Attorney General failed to update and republish in the Federal Register the schedules of "controlled substances" as required by 21 U.S.C. § 812(a), and, if he did, whether that failure precluded the defendants' prosecutions for possession of marijuana;[2] (2) whether the court erred in denying the defendants' motion to suppress marijuana which had been seized in a warrantless search of an automobile; and (3) whether the evidence was sufficient to prove that defendants had knowingly possessed the drug with intent to distribute it.

The evidence to which the parties had stipulated consisted primarily of the testimony that Government witnesses had given at the hearing on the motion to suppress. In a memorandum opinion issued April 20, 1973, the district court denied the motion.

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[1] Subsection 841(a)(1), part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, provides:

> "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ."

21 U.S.C. § 802(6) defines "controlled substance" as a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V, as established by sections 811 and 812.

[2] On May 11, 1973, the district court denied defendants' motion to dismiss the indictment because of the Attorney General's supposed failure to comply with the republication provision of the Comprehensive Drug Abuse Prevention and Control Act.

Customs agents Robert Smith and Thomas King provided the principal evidence for the Government. Smith testified that on January 7, 1972, he had received a telephone call from a reliable informant, who told him that two men and a woman driving a blue Toyota with a specified Texas license plate were in Chicago attempting to locate buyers for narcotics. The three persons supposedly were staying at a motel at a designated location on the north side of Chicago. After Smith verified that an automobile fitting the informant's description was at the motel, he and another agents maintained surveillance. From his post, Smith could see two men and a woman in the room to which the car's occupants had been assigned. A check by another agent revealed that the Toyota was registered to a M. Guerra and that Carol Guerra, the owner's daughter, was under indictment in Texas. In appearance, the woman in the motel room corresponded with the description Smith received of Carol Guerra. The agents also learned that the automobile had recently been in Mexico.

Agent Smith next observed defendant Pendergast drive up to the motel, enter the trio's room, and engage in conversation with the group. The agents checked the registration on Pendergast's vehicle. They learned that the car was registered to Pendergast at a Carbondale, Illinois, address. "[O]ur St. Louis office . . . stated that Mr. Pendergast was known in that area as a dealer in marijuana." When the persons in the room left and went to a garage at the rear of 1203-5 North State Street, Government agents followed them. They saw the Toyota backed into the garage while the woman resembling Carol Guerra remained in the adjacent alley. Smith testi-

fied that the woman kept glancing up and down the alley and appeared, to Smith, to be acting as a lookout. After a brief period, the person left the garage.

Later in the day, the agents returned with a search warrant to the garage but found no contraband.

The next day, Saturday, January 8th, customs agents placed the garage under surveillance. About 1:50 p.m., agents Smith and King saw Nocar and Pendergast walk down the alley behind State Street. Smith drove his automobile to the south end of the alley, where King got out and began walking north. King testified that as he walked past the garage, he saw the blue Toyota with Texas license plates backed up to the door of the garage, its rear about a foot or two inside the building. The trunk of the car was open, and the garage door had been pulled down to the level of the trunk lid. A rug had been draped over the area between the open trunk lid and the body of the Toyota. King testified that the view provided by the angle formed by the garage door and the wall of the garage enabled him to look into the building as he passed. During the approximately fifteen seconds he was at his vantage point, King observed defendant Nocar remove some white bags from the trunk of the Toyota and hand them to Pendergast, who placed them in the back of the garage. After observing these actions, King continued walking until he was some yards north of the garage whereupon he turned and signaled to agent Smith.

On the signal, Smith drove up the alley and jumped from his automobile, shouting, "Federal officers." Smith entered the garage at the same time that King, with gun drawn, did. Meanwhile, one of the defendants had slammed shut the trunk of the Toyota. Several other

agents then joined those in the garage. Smith testified that he asked Nocar to open the trunk, and that Nocar shrugged his shoulders and did so. Smith observed white plastic bags and vegetable material in the trunk. He also detected a strong odor of marijuana. He then told the defendants that they were under arrest and read them their rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). A field test revealed the substance in the bags to be marijuana. By 2:15 p.m., the agents had searched the garage and had found two suitcases containing approximately 6000 grams of marijuana.

The defendants testified in their behalf at the suppression hearing. Their version of the search differed somewhat from that of the agents. For example, they claimed that they did not hear the announcement "Federal officers" and that agent Smith demanded, rather than requested, that Nocar open the trunk.[3]

I

Defendants' first contention rests on their interpretation of 21 U.S.C. § 812(a), which provides in pertinent part:

> "There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period

[3] In its memorandum opinion on the motion to suppress, the district court found that Nocar had not freely and voluntarily consented to the search of the trunk. "There was conflicting testimony . . . as to whether Nocar was asked to open the trunk or ordered to do so. It is clear that Agent King entered the garage with his gun drawn. It is not unreasonable to infer that Nocar believed that he was in custody even before he was told that he was under arrest. . . . [T]he Government failed to meet its burden of proof on its consent theory."

> beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter."

Subchapter I of the Comprehensive Drug Abuse Prevention and Control Act of 1970 was enacted on October 27, 1970. Marijuana was listed in schedule I of the statute.

The defendants maintain that the schedules should have been first republished and updated on the initial anniversary date, October 27, 1971, and subsequently on April 27, 1972, six months later. There was no republication on October 27. The Director of the Bureau of Narcotics and Dangerous Drugs first expressly invoked section 812(a) and fully republished the schedules on May 12, 1972, 37 Fed. Reg. 9545 (1972):

> "The Comprehensive Drug Abuse Prevention and Control Act of 1970, in section 202(a) (21 U.S.C. 812(a)), requires that the schedules of controlled substances established by that Act be updated and republished on a semiannual basis during the 2-year period beginning 1 year after the effective date of that Act. The effective date of that Act was October 27, 1970. Pursuant to the mandate of section 202(a), therefore, the Director hereby orders the publication of the schedules of controlled substances as of April 27, 1972."

Actually, schedules had been published approximately a year earlier in the Federal Register but not apparently pursuant to the mandate of the Act. In 36 Fed. Reg. 4928 (March 13, 1971), the Director had published under the caption of "Notice of Proposed Rule Making" a comprehensive set of regulations implementing the Act. The regulations covered, *inter alia,* registratior of manufacturers, labelling and packaging, quotas, records, and reports. Also included was Part 308, schedules of controlled substances established by the Act "as they are changed, updated, and republished from time to time. . . ."

In response to objections to and comments on the proposed regulations, various amendments were made and the regulations as revised were published in 36 Fed. Reg. 7776, on April 24, 1971. In the proposed regulations, code numbers were given to the various controlled substances. In the regulations as finally published the scope and function of the code numbers was defined. These numbers do not appear in the schedules of the Act.

We do not deem that the publication of the schedules in March and April of 1971 were either necessitated by or were in compliance with the updating-republication requirement of the Act but were merely a part of the overall implementing regulations for the Act.

We disagree with the defendants' reading of section 812(a). The second sentence of the provision does not require republication on October 27, 1971. Rather, it directs that that date be used to determine when, during the following two years, the six-month demarcations are to fall. Therefore, the first republication was due on April 27, 1972, eighteen months after the enactment of the subchapter and one half year after the first anniversary.

The meaning that the defendants ascribe to the section would be supported, not by the provision as presently written, but by, for example, "The schedules established by this section shall be updated and republished one year after the date of the enactment of this subchapter and every six months thereafter for two years."

Amicus curiae contends that the May 12th republication, stated to be effective as of April 27, 1972, violates due process because of its retroactivity. We need not reach this issue, for the rights of these defendants obviously were not infringed. Their alleged violation of the drug

laws occurred in January 1972, when, as we held above, the Government's obligation to republish the schedules in accordance with section 812(a) had not yet ripened. The non-publication cases upon which the defendants rely, *Hotch* v. *United States*, 212 F.2d 280 (9th Cir. 1954), and *Borak* v. *Biddle*, 141 F.2d 278 (D.C. Cir. 1944), are thus inapplicable.

In sum, in January 1972 there was a valid prohibition in force making unauthorized use of marijuana a crime.

The defendants also argue that even if there had been a timely republication it would not have been valid inasmuch as the Director of the Bureau of Narcotics and Dangerous Drugs caused the republication rather than the Attorney General, 21 U.S.C. § 811. This argument, of course, is disposed of by our holding that the republication requirement had not ripened as of the date of activities involved in the present case. However, we also note that in 28 U.S.C. § 510, Congress provided that the Attorney General may make such provisions as he considers appropriate to allow other officers, employees or agencies to perform any of his functions. 28 C.F.R. 0.100 subdelegates the functions of the Attorney General under the Comprehensive Drug Abuse Prevention and Control Act to the Director of the Bureau of Narcotics and Dangerous Drugs.

II.

The defendants claim that they do not quarrel with the holdings in *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970), and *Carroll* v. *United States*, 267 U.S. 132, 149 (1925), upon which the trial court in part relied in denying the motion to suppress the marijuana seized from the automobile trunk. Their complaint is that the foundation of those cases, the existence of probable cause, was lack-

ing in their case. The district court had concluded that "[t]he evidence clearly shows . . . that the agents had probable cause to believe that the Toyota contained contraband drugs."

As the defendants point out, the informer's tip, as recapitulated by agent Smith, did not describe the basis for the informer's assertion that the persons he mentioned were attempting to sell narcotics. However, we certainly cannot fault the agents for following up the tip. It clearly was superior to casual rumor. The confidential source had previously given information to Government agents about illicit heroin and hashish traffic, which tips had resulted in four seizures and an unspecified number of arrests and convictions. The tip consisted in part of detailed information that was readily verifiable by independent means. The agents investigated these specifics, and from their own observations confirmed the existence of the persons, the automobile, and the motel registration. The reports stemming from the tracing of the blue Toyota and Pendergast's car further enhanced the tip's credibility. Next, the agents saw Carol Guerra acting suspiciously in the alley behind the State Street garage on January 7th.

Despite these corroborative indicia, the defendants contend that the fruitless search conducted on January 7th would have persuaded a reasonable person that the tip was probably inaccurate. The lack of contraband in the garage on Friday surely did not mandate the agents' abandoning their investigation. They had ample justification for keeping a watch on the garage the following day. During that surveillance, agent Kling saw defendant Nocar take white plastic bags from the Toyota's trunk and hand them to defendant Pendergast. Although King testified that he could not ascertain what substance was

in the bags, we think it judicially cognizable that marijuana is often transported in bags. The covert garage activities smacked of the illegal activity customarily associated with drug transactions.

What agent King observed and the slamming of the trunk lid upon Smith's shout of "Federal officers" were the last needed corroboration of the informer's tip to create probable cause. *Carroll, supra* at 149, explains that term as "a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile . . . contains that which by law is subject to seizure and destruction," a definition applicable to the instant case, too. "[T]he facts and circumstances within [the agents'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." *Id.* at 162. The evidence at the hearing was sufficient to meet the test the Supreme Court has stated in a related context: "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. . . ." *Spinelli* v. *United States,* 393 U.S. 410, 419 (1959). The agents here had many more facts on which to rely than had the agents in *Henry* v. *United States,* 361 U.S. 98 (1969), which defendants cite. Contrast also *Coolidge* v. *New Hampshire,* 403 U.S. 443, 458-64 (1971).

Not only was there probable cause, but the search of the Toyota and the seizure of the marijuana were not "unreasonable." It was not practicable for the agents to try to obtain a search warrant before conducting the search. The defendants emphasize that the Federal Building was a mere mile and one half from the garage, but

they minimize the difficulty of finding a magistrate on a Saturday afternoon without risking the loss of the possible contraband. The magistrate is present there on Saturdays only until noon. If the hunt for a magistrate and the warrant procedures had taken several hours, the defendants would now be arguing that the agents had violated their constitutional rights by preventing them from leaving the scene. Further, the Government would face a similar challenge had Carol Guerra or the unidentified male in the motel room or another person come to remove the Toyota. See *Chambers* v. *Maroney, supra* at 52, where the Court explained that

> "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

III.

The defendants' final argument is that the Government failed to prove the statutory elements of possession and intent to distribute.

Agent King testified that when he walked by the garage on the afternoon of January 8th he saw defendant Nocar removing some white bags from the trunk of the blue Toyota and handing them to defendant Pendergast. He also observed Pendergast take the bags and move them to the rear of the garage. King then signaled to agent Smith, and the men moved in to make the seizure. This testimony shows that the defendants had actual possession of the marijuana. That one of the defendants slammed the trunk shut when he realized that the agents

were near does not negate the defendants' exercise of dominion and control over the marijuana immediately prior to the arrest. Because of King's observations, the Government did not need to establish that the defendants owned or leased the garage or the automobile or the suitcases.

The defendants also maintain that the agent's observations and the quantity of the contraband recovered are the only evidence the Government adduced as to their intent to distribute or sell and that such evidence was insufficient to meet the statutory requirement. Direct evidence of a sale or of the dollar value of drugs is not essential. As courts have frequently pointed out, knowledge and intent must often be proven by circumstantial evidence. At least two circuits, the Fifth and the Eighth, have held that proof of possession of substantial amounts of controlled substances supports the inference that the possessor intended to distribute the drugs rather than retain them for personal use. In *United States* v. *Mather,* 465 F.2d 1035 (5th Cir. 1972), *cert. denied,* 409 U.S. 1085 (1973), the defendant was carrying 197 grams of cocaine when he was arrested. In *United States* v. *Perry,* 480 F.2d 147 (5th Cir. 1973), the defendant possessed 188 pounds of hashish, and in *United States* v. *Johnson,* 469 F.2d 973, 977 (5th Cir. 1972), the amount was 133 pounds of marijuana. Citing *Mather,* the court in *United States* v. *Echols,* 477 F.2d 37 (8th Cir. 1973), *cert. denied,* 414 U.S. 825, held that the possession of 199 grams of cocaine was sufficient to support an inference of intent to distribute. Here, defendants possessed 18,770 grams, approximately 40 pounds, of marijuana.

We agree with the Fifth and Eighth Circuits. *Cf. United States* v. *Ortiz,* 445 F.2d 1100, 1104-1105 (10th Cir. 1971), *cert. denied,* 404 U.S. 993; *United States* v. *Cerrito,* 413 F.2d 1270 (7th Cir. 1969), *cert. denied,* 396 U.S. 1004 (1970). It is consistent with House Report No. 91-1444, which accompanied H.R. 18583, the basis for the present Act: "The quantity of a drug found in the possession of a person, of course, bears upon the question of whether or not his possession is for his own use, or is for the purpose of illicit transactions involving others, for which much more severe penalties are provided." 3 U.S. Code Cong. & Adm. News, 91st Cong., 2d Sess. (1970-71), at 4577.

We therefore affirm the judgments of conviction of Joseph Nocar and John Pendergast.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Constitution of the United States

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 21 U.S.C.A. — Section 811

§ 811. *Authority and criteria for classification of substances—Rules and regulations of Attorney General; hearing*

(a) The Attorney General shall apply the provisions of this sub-chapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed;

or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

U.S.C.A. Title 21 — Section 812

§ 812. *Schedules of controlled substances—Establishment*

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-131

JOSEPH NOCAR AND JOHN PENDERGAST, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that (1) the failure of the Director of the Bureau of Narcotics and Dangerous Drugs to republish the schedules of "controlled substances", as required by 21 U.S.C. 812(a), precluded their prosecution for possession of marijuana; and (2) the court erred in denying their motion to suppress marijuana which had been seized in a warrantless search of an automobile.

After a jury-waived trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of having possessed a quantity of marijuana with intent to distribute the same, in violation of 21 U.S.C. 841(a)(1). Petitioner Nocar was sentenced to a term of three years' imprisonment to be followed by a special three-year parole term; petitioner Pendergast was sentenced to a term of six months' imprisonment to be followed by four years' probation. The court of appeals affirmed (497 F. 2d 719; Pet. App. 1-13).

The evidence as summarized by the court of appeals (Pet. App. 3-5) showed that on January 7, 1972, federal customs agents received an informant's tip that three persons driving a blue Toyota with a specified Texas license number were at a named Chicago motel trying to find narcotics buyers. After verifying that the described car was at the motel, the agents established surveillance. A motor vehicle check showed that the Toyota recently had been in Mexico. The agents observed petitioner Pendergast arrive at the motel, enter the room, and converse with the three others. The agents subsequently followed the four persons to a garage. Later that day, after the four had left the garage, the agents returned with a search warrant, but found no contraband.

Surveillance of the garage was continued the next day. After Agent King saw petitioner Nocar remove some white plastic bags from the trunk and hand them to petitioner Pendergast, Agent Smith jumped from his car, and shouted "federal officers." One of the petitioners immediately closed the trunk. Agent Smith thereupon asked Nocar to open the trunk; Nocar shrugged his shoulders and did so.[1] Agent Smith observed white plastic bags and vegetable material in the trunk. He also detected a strong odor of marijuana. Petitioners were placed under arrest, and an immediate search of the garage revealed a substantial quantity of marijuana.

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[1]At a pretrial suppression hearing petitioners testified to a different version of events. For example, they denied hearing Smith shout "federal officers" and contended that Smith had demanded, rather than requested, that Nocar open the trunk. On the latter point the trial court held that the government had "failed to meet its burden of proof on its consent theory." Since the court of appeals held that the warrantless search was justified by probable cause and the necessity to prevent removal of the contraband, it stated no conclusion on the consent theory.

1. Petitioners contend that the alleged failure of the Director of the Bureau of Narcotics and Dangerous Drugs timely to republish and update the schedules of controlled substances as mandated by 21 U.S.C. 812(a) warrants the reversal of their convictions. Section 812(a) provides in part:

> * * * The schedules established by this section shall be updated and republished on a semiannual basis during the two year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

The subchapter was enacted on October 27, 1970. Marijuana was listed in schedule I of the statute. Petitioners contend that the statute made republication of the schedules mandatory on October 27, 1971. As the court below held, however, the statutory provision does not require republication on October 27, 1971. Rather, it directs that that date be used to determine when, during the following two years, the six-month demarcations were to fall. The first republication, therefore, was due April 27, 1972. Accordingly, in January 1972, when petitioners' offense occurred, there was a valid prohibition in force, regardless of what steps the government might have failed to take thereafter.

2. Petitioners also contend that the trial court erred in denying their motion to suppress, since the search allegedly was not grounded on probable cause. The foregoing evidence, however, presented at the hearing on the motion to suppress, clearly provided probable cause for the search. *Carroll* v. *United States,* 267 U.S. 132, 149. Moreover, the agents' failure to obtain a search warrant was justified by the need to prevent

removal and loss of the contraband. Although the garage was not far from the Federal Building, there was no magistrate available at the time to issue a search warrant. As the court below noted, much time might have been consumed in finding an available magistrate, during which time the automobile would have had to be seized and held. Under these circumstances, given probable cause to search, the immediate search without a warrant was permissible. *Chambers* v. *Maroney*, 399 U.S. 42, 52.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10